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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The federal respondents (the United States and the Federal Communications Commission ("FCC")) and the State Broadcasters Associations ("Broadcasters") have opposed the petition for a writ of certiorari herein. Significantly, the federal respondents nonetheless explain in great detail how the court of appeals erred in striking down the FCC's equal employment opportunity ("EEO") rules on a facial challenge (in direct contravention of this Court's well-established precedents, as we showed in our petition). Both responses labor mightily to downplay the significance of the decision below, urging that the case will be confined to its facts and that the FCC remains free to adopt new EEO rules.

In this reply, we show that the court of appeals' decision cannot be written off so easily. Quite to the contrary, the decision below calls into doubt for the first time efforts by government agencies to collect data on employment and race, and threatens to bring about wholesale changes in the way facial challenges to statutes and regulations are evaluated. And although the FCC has proposed new EEO rules that would effectively reinstate Option A of the regulations that were struck down by the D.C. Circuit, the FCC will have to go through a rulemaking proceeding hamstrung unnecessarily by a flawed decision unless this Court vacates or reverses the decision below. Furthermore, any new regulations that result from the FCC's rulemaking will be subject to judicial review in the D.C. Circuit under precedent that disregards this Court's facial challenge case law. For these reasons, petitioners urge that their petition for a writ of certiorari be granted.

A. The Court of Appeals Did Not Simply Misapply, But Rather Ignored, This Court's Standards for Reviewing Facial Challenges.

The federal respondents acknowledge the serious constitutional errors in the decision below. Federal Respondents' Br. at 15–17. In contrast, the Broadcasters

attempt to justify the court of appeals' decision on the merits, but their tepid defense actually highlights the critical flaws in the decision. The court of appeals did not engage in "intellectual acrobatics" (Broadcaster Br. at 8) to envision a scenario where the regulations could be upheld, but concocted one (without any record support) under which they could be struck down. That approach contravenes any standard used by this Court to evaluate facial constitutional challenges.[1]

Having acknowledged that the decision is seriously flawed, the federal respondents strive to downplay its significance by contending that the court of appeals simply erred in applying

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[1] The Broadcasters suggest that petitioners have improperly relied on *United States v. Salerno*, 481 U.S. 739 (1987), as the sole standard for reviewing facial challenges. To the contrary, our petition notes that *Salerno* states *one* formulation of the facial challenge test, and provides examples of other such formulations used by this Court. See Minority Media and Telecommunications Council ("MMTC") *et al.* Petition at 14 n.9. The Broadcasters also oversimplify *Salerno*, arguing (at 7) that *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), rejects *Salerno*'s facial challenge formulation. In fact, *Morales* did not dispute the first part of the *Salerno* test, which states that even if a law "might operate unconstitutionally under some conceivable set of circumstances," that fact is "insufficient to render [the law] wholly invalid." 481 U.S. at 745. That conclusion is relevant here, as the court of appeals struck down the EEO Rules because it conceived of a circumstance in which the FCC might implement the Rules improperly. The second part of the *Salerno* test, disputed by three Justices in *Morales*, requires that to uphold a facial challenge, the challenger must prove "that no set of circumstances exists under which the Act would be valid." *Id.* But the facial constitutionality of the FCC's regulations does not depend upon any particular test, because the rules satisfy each such standard that this Court has previously identified.

The Broadcasters also cite *Bigelow* v. *Virginia*, 421 U.S. 809, 817 (1975), as an example of this Court's application of its facial challenge standards. Broadcaster Br. at 8. In *Bigelow*, however, the Court "decline[d] to rest [its] decision" on the facial challenge question, and instead decided "whether the statute *as applied* to appellant infringed constitutionally protected speech." 421 U.S. at 818 (emphasis added).

settled law to case-specific facts. Even if that were all the court below had done, the case still would be worthy of review because it serves as a seriously flawed precedent that could adversely affect the development of the law. But in fact, the court of appeals did much more than just misapply the law. It struck down regulations as unconstitutional on their face only by ignoring and flouting this Court's precedents. The court below also made broad pronouncements about the negative impacts of inclusive recruiting practices, to the effect that such recruiting will inevitably result in some individuals or groups not receiving information about employment opportunities that they would otherwise have obtained. See App. 13a-14a. Those pronouncements were not findings of fact based on record evidence, but critical elements of the court's legal analysis.

The most obvious impact of the decision below is that it can be used to attempt to constrain the ability of government agencies to collect information about employment and race. See Federal Respondents Br. at 15 (noting that many agencies collect such data to ensure compliance with nondiscrimination requirements); MMTC *et al.* Petition at 22 & n.12 (citing examples of government race and gender data collection). Notwithstanding the respondents' contentions, the decision below can be read to cast doubt on the constitutionality of such data reporting requirements, as the decision permits courts to speculate that such programs could "pressure" employers into discriminating.[2]

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[2] In addition, the court of appeals's decision could be read as effectively striking down in part section 334(a) of the Communications Act of 1934, which prohibited the FCC from revising its EEO rules or "the forms used by [broadcast] licensees and permittees to report pertinent employment data to the Commission." 47 U.S.C. § 334(a), App. 279a. One of the forms codified by section 334(a) was Form 396, which required licensees to report the sources used to attract applications from minorities and women, and the number of referrals from those sources.

Even more significantly, the decision below invites anyone making a facial constitutional challenge to regulations or statutes to advocate that laws should be struck down based on speculation about their effects. That the court below did not openly admit that its method for evaluating a facial challenge was in direct conflict with this Court's precedents (and those of every other court of appeals) does not make this matter any less worthy of further review. Lower court decisions are not insulated from review by this Court when they ignore binding precedent instead of questioning openly its application in a particular context. In any event, the conflict between the decision below and this Court's facial challenge case law could not be any more plain. And this Court has granted certiorari in cases where the conflict between a court of appeals decision and this Court's decisions was not necessarily explicit.[3] Furthermore, certiorari is also appropriate in cases where a decision on a matter of public importance was obviously incorrect.[4]

Respondents also seek to downplay this case by contending that it will be viewed as agency specific. But this case is worthy of review even if it could be limited in that manner (which, as we discuss below, is highly unlikely). The decision below could have profound effects on the FCC's ability to carry out its congressional mandate, and not just in the context of

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[3] See, *e.g.*, *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted because the ruling below "appeared to be in conflict with our precedents"); *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U.S. 129, 130 (1959) (certiorari granted because the ruling below "seemed to be out of line with the authorities").

[4] See, *e.g.*, *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (certiorari granted where state court had incorrectly applied federal preemption doctrine); *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 336 (1982) (certiorari granted because undisputed facts disclosed a Sherman Act violation).

equal employment opportunity. Among other things, the decision below suggests that concerns over the FCC's theoretical use of its licensing power authorize courts of appeals to analyze the facial constitutionality of FCC regulations under standards that are far less deferential than those that apply elsewhere.

In any event, the decision below cannot be cabined as peculiar to the FCC. The court of appeals' approach to resolving the Broadcasters' facial challenge—while obviously undertaken in a case involving FCC rules—applies as well to regulations promulgated by other administrative agencies. The court of appeals' finding of "pressure" to recruit minorities was grounded in the ability of agencies to subtly influence regulated entities into compliance with agency objectives. In fact, the court of appeals relied upon decisions involving *other agencies* in reaching its conclusions. *E.g.*, App. 11a (relying upon *Chamber of Commerce* v. *Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999), which recognized OSHA's leverage over employers due to its inspection and sanction powers).

Furthermore, lower courts will not necessarily be persuaded to distinguish away the decision below based on the FCC's licensing power over broadcasters. Federal, state, and local government agencies impose a variety of licensing and permitting requirements that can, directly or indirectly, affect an individual's or a company's ability to stay in business.[5] And the award or loss of government contracts or grants, as well as law enforcement action outside the context of licenses or permits, obviously can and does influence individual and corporate business behavior in a variety of contexts, even when

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[5] Even where, for instance, the government does not require a license to engage in a particular kind of business, the need to obtain permits because of secondary effects from engaging in a particular kind of business (such as permits necessary to discharge regulated substances into the environment) can be critical to the continued operation of a business.

they do not threaten to put anyone out of business. Thus, the decision below plainly can be used to raise serious questions about the constitutionality of statutes or regulations enforced by agencies other than the FCC.

Finally, the government's optimistic prediction that the FCC's licensing power will render the decision below *sui generis* is not borne out by the reaction to *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). Even though *Lutheran Church* turned in significant part on the FCC's investigative power over broadcasters, several courts of appeals have, in cases not involving the FCC, relied on *Lutheran Church* to conclude that other government efforts to encourage minority participation can be as unconstitutional as mandatory racial preferences. See, *e.g.*, *W.H. Scott Constr. Co.* v. *City of Jackson*, 199 F.3d 206, 215 (5th Cir. 1999) (striking down city policy on minority participation "goal" for construction contracts); *Safeco Ins. Co. of Am.* v. *City of White House*, 191 F.3d 675, 689-92 (6th Cir. 1999) (raising serious constitutional doubts about EPA contracting policy while remanding for further proceedings). Petitioners are not questioning the result in *Lutheran Church* or the decisions following it. Nonetheless, regardless of whether these decisions are correct, they suggest strongly that some courts will not limit the decision below to its facts.

In short, the decision below clearly is worthy of review. That the court of appeals (1) upheld a facial challenge doing precisely what this Court's precedents forbid, (2) essentially treated this case as though it involved an as-applied challenge to the regulations, and (3) drew conclusions that had no record support and were precisely the opposite of those intended by the FCC, are reasons enough to grant certiorari. Even more significantly, the decision below cannot realistically be confined

to the peculiar set of facts concocted by the court of appeals, or even to the actions of one agency.[6]

B. The FCC's Proposed Rule Making Does Not Lessen the Importance of This Case.

The FCC's issuance of a Notice of Proposed Rule Making concerning new EEO rules does not in any way diminish the importance of this case. We agree that the FCC arguably should be able to, within the confines of the decision below, reinstate Option A. But the decision below robs the FCC of considerable flexibility in the design of new EEO regulations and other future regulations.

For example, Option B of the existing regulations presented broadcasters and cable operators with a unique opportunity to experiment in recruiting outreach, by designing their own program to ensure that information about job openings is distributed widely. Experience under Option B could have, over time, produced valuable data that would have shown the FCC and the industry efficient methods to improve recruiting outreach and possibly to expand the menu of recruiting devices broadcasters and cable operators can select from under Option A. This experiment, however, was cut short prematurely and unnecessarily by the decision below. If this Court were to grant certiorari and then vacate the decision below, the FCC's outreach experiment could continue. The FCC could then, if it wanted to, still improve on the regulations further, without

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[6] *The Broadcasters also argue that the facial challenge question was not the focus of the proceedings below. Broadcaster Br. at 1. In fact, the issue was squarely raised by the Office of Communication, Inc., United Church of Christ in its Petition for Rehearing or Rehearing En Banc (at 18-19). Further, Judge Tatel, in his dissent from the denial of rehearing en banc, discussed the issue at length. App. 27a-32a. Moreover, the facial challenge issue arose out of the court of appeals' method of resolving this case. No party would have predicted prior to the panel's decision that the court would ignore this Court's facial challenge jurisprudence altogether.*

being bound by a court of appeals decision that the federal respondents acknowledge was wholly flawed. In short, Option B allowed the EEO rules to be more flexible and presented opportunities for fine tuning, which should only have enhanced their constitutionality. The FCC should not be forced to give up Option B just because the court of appeals insisted on imagining only a worst-case scenario.

Even if the FCC were committed to discarding Option B at this point (and it has given no indication that it would discard Option B if it were still available), the FCC's rulemaking process (and any other EEO rulemakings initiated by other agencies that may be initiated in the light of the decision below) would be enhanced by further review of the decision below. This Court could provide guidance (apparently much needed, given the decision below) on how to evaluate facial challenges based on equal protection grounds. This guidance would ensure that any facial challenges to regulations the FCC might promulgate in the future would be considered under the proper standard.[7] In sum, this case is still important, notwithstanding the FCC's decision to institute a new EEO rulemaking.

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[7] *It is highly unlikely that the grant of certiorari in this case would delay materially, if it all, the effective date of any new rules. Comments and reply comments on the proposed rules are not due for several months, and the FCC will require several additional months to issue its report and order if it chooses to promulgate new EEO regulations. Accordingly, a merits decision by this Court issued by the end of this Term would allow the FCC to complete its rulemaking proceeding in a timely manner.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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